



PATENT
Customer No. 22,852
Attorney Docket No. 5725.0555-00

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of:)
Mireille MAUBRU et al.) Group Art Unit: 1751
Application No.: 09/486,558) Examiner: M. Einsmann
Filed: April 13, 2000)
For: DYEING COMPOSITION FOR)
KERATIN FIBRES)

Commissioner for Patents and Trademarks
Washington, DC 20231

Sir:

REPLY BRIEF

Pursuant to 37 C.F.R. § 1.193, Appellants submit this Reply Brief to the Board of Patent Appeals and Interferences in response to the May 6, 2002, Examiner's Answer, in the above-identified application.

If any additional fees are required or if the enclosed payment is insufficient, Appellants request that the required fees be charged to Deposit Account No. 06-0916.

I. ISSUES

Whether claims 20-47 are patentable under 35 U.S.C. § 103(a) over U.S. Patent No. 3,918,896 (Kalopissis) in view of U.S. Patent No. 5,061,289 (Clausen).

As correctly pointed out in the Examiner's Answer, the claims were also rejected under the doctrine of obviousness-type double patenting. Appellants previously requested that this rejection be held in abeyance and, thus, this issue is not on appeal.

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II. ARGUMENT

The appealed rejection is based on the position that the claimed invention is *prima facie* obvious because, although it is a novel composition, it is comprised of old components. This position is legally erroneous. The rejection is supported only by selective and misstated readings of the cited references. As shown below, these errors are exacerbated by the internally inconsistent arguments contained in the Answer Brief.

A. **LEGALLY, IT IS IMPERMISSIBLE TO REJECT AN INVENTION MERELY BECAUSE IT IS A COMBINATION OF OLD ELEMENTS.**

In the Answer Brief the Examiner argued that “a heterocyclic oxidation base is perfectly equivalent to paraaminophenol” and that “Kalopissis clearly teaches the equivalence of a heterocyclic oxidation base in place of paraaminophenol.” (Answer, pg. 6, ln. 16-19.)¹ Similarly, the Examiner argued that the presently claimed invention is obvious because it is *prima facie* obvious to combine two compositions in order to form a third composition. (Answer, pg. 5, ln. 19-21.)

By these theories, all combinations of known hair dye components are *prima facie* obvious. However, the invalidity of this position has been recognized in countless Supreme Court and Federal Circuit decisions. See, e.g., *Graham v. John Deere Co.*, 383 U.S. 1 (1966); *United States v. Adams*, 383 U.S. 39 (1966); *In re Kotzab*, 55 USPQ2d 1313, 1316 (Fed. Cir. 2000) (“Most if not all inventions arise from a

¹ As discussed below in section II.B.2, the alleged factual premise of this argument is also false and unsupported by Kalopissis. Moreover, this generalized equivalence is expressly contradicted by the Examiner’s recent indication (in view of the same references) that if the appealed claims were limited to triaminopyrazoles (by eliminating diaminopyrazoles) “they would be allowable.” (Exhibit 1, Proposed Examiner’s Amendment dated May 2, 2002, pg. 2, ln. 6-8.) The Examiner thus acknowledged that not all oxidation bases, much less all aminopyrazole heterocyclic oxidation bases, are equivalent.

combination of old elements... identification in the prior art of each individual part claimed is insufficient to defeat patentability of the whole claimed invention." (citations omitted).); *In re Rouffet*, 47 USPQ 2d 1453 (Fed. Cir. 1998); *Custom Accessories Inc. v. Jeffrey-Allan Ind. Inc.*, 1 USPQ2d 1196, 1198-1199 (Fed. Cir. 1986) ("A traditional problem with focusing on a patent as a 'combination of old elements' is the attendant notion that patentability is undeserving without some 'synergistic' or 'different' effect... Though synergism is relevant when present, its absence has no place in evaluating the evidence on obviousness." (footnotes and quotations omitted).). The theory of the present rejection is exactly the misdirected logic that is prohibited by the courts with respect to the combination of known components. See, e.g., *Fromson v. Advance Offset Plate, Inc.* 225 USPQ 25, 31 (Fed. Cir. 1985) ("There is no basis in the law... for treating combinations of old elements differently in determining patentability.").

In particular, the rejection's premise that it is *prima facie* obvious to combine known components or substitute equivalents is especially inapplicable for reactive oxidation dye components.² When there is a functional relationship between components, the law is clear for a novel combination: is not *prima facie* obvious to combine known components. *Adams*, 338 U.S. at 50. In *Adams*, for example, the claimed invention was a wet battery with magnesium and cuprous chloride electrodes. *Id.* at 42. The prior art showed wet batteries with zinc and silver chloride electrodes, and that zinc and silver chloride may be substituted with magnesium and cuprous

² As explained by Kalopissis, "'couplers' react in an oxidizing medium with the 'oxidation bases' to produce dyes which impart to the fibers or to living human hair a great variety of shades... [the properties of the resultant dyeing] depend[] upon the chemical structure of the two reactants." (Kalopissis, col. 1, lines 26-30 (emphasis added).) The Examiner has agreed that Kalopissis's explanation of oxidation hair dye reactivity is a correct "statement of what is known in the art." (Answer, pg. 9, ln. 17-20.)

chloride, respectively. *Id.* at 48. Based such a substitution, it was argued that the claimed battery was obvious. *Id.*

The Supreme Court, however, found this position to be flawed. *Id.* They distinguished *Sinclair & Carroll Co. v. Interchemical Corp.* 325 U.S. 327 (1945), where the substitution of an inert component for an equivalent component was held to be obvious, based on the fact that in *Adams* "the [claimed] battery is shown to embrace [known] elements having an interdependent functional relationship." *Adams*, 338 U.S. at 49-50 (emphasis added). Specifically, they held that "[i]t begs the question... to state merely that... [the elements] were individually known battery components [and therefore obvious]. If such a combination is novel, the issue is whether bringing them together as taught by [the applicant] was obvious in the light of the prior art." *Id.* at 50.

The emphasis in *Adams* on functional relationships between components explains why *In re Kerkhoven*, 205 USPQ 1069 (CCPA 1980) is factually distinct from the present case, and why the Examiner's reliance on *Kerkhoven* (see, e.g., Answer Brief, pg. 5, ln. 18 - pg. 6, ln 2) is misplaced. Specifically, unlike *Adams*, in *Kerkhoven* the applicant claimed a process for preparing a detergent composition comprising merely mixing one anionic and one cationic detergent. *Kerkhoven*, 205 USPQ at 1070. Unlike *Adams* and the present facts, there was no functional or chemically reactive relationship between the components in the *Kerkhoven* process of mixing anionic and cationic detergents.

The rejection's premise that a novel composition of old, chemically reactive components is *prima facie* obvious, based either on an alleged equivalence or combination of compositions, cannot be sustained.

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B. FACTUALLY, THE REJECTION IS INTERNALLY INCONSISTENT, AND CONFLICTS WITH THE TEACHINGS OF THE CITED REFERENCES.

The Answer Brief contains several different rationales in support of the rejection. For example, it is argued that Kalopissis teaches compositions with p-aminophenol; Clausen teaches a diaminopyrazole to be superior to p-aminophenol; therefore it would have been to "at least partially substitute" p-aminophenol with diaminopyrazole. (Answer, pg. 4, ln. 15-17.) Additionally, it was argued that it would have been obvious to replace the p-aminophenol or any other oxidation base in Kalopissis with Clausen's diaminopyrazole based on a 'known equivalence' of oxidation bases. (Answer, pg. 6, ln. 15-17.) These positions, however, are internally inconsistent and conflict with the teachings of both Kalopissis and Clausen.

- 1. The rejection inconsistently relies on the presence of p-aminophenol in the Kalopissis compositions but then denies the teaching that this component is essential.**

The Answer Brief contains arguments inconsistent with both the express teachings of the primary reference (Kalopissis) and the original rejection theory. Specifically, in the Answer Brief the Examiner stated that "[t]his office fails to see where Kalopissis states that paraaminophenol 'is essential to the composition and must be present.'" (Answer, pg. 6, ln. 10-11.). However, the actual failure is not considering the reference in its entirety, including the portions that lead away from the proposed combination. *W.L. Gore & Associates v. Garlock, Inc.*, 220 USPQ 303 (Fed.Cir. 1983).³

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³ "[T]he district court erred... in considering reference in less than their entireties, i.e., in disregarding disclosures in the reference that diverge from and teach away from the invention at hand." Gore at 331 (citations omitted).

- a. P-aminophenol is an essential feature of Kalopissis example compositions 22, 27, and 32, and cannot be replaced with Clausen's diaminopyrazole, as proposed by the Examiner.

Kalopissis examples 22, 27, and 32, cited as the compositions proposed for modification (Office Action dated Dec. 22, 2000, pg. 5, ln. 8-13), each contain one and only one oxidation base: p-aminophenol. (Kalopissis, col. 11-13.) In view of Kalopissis's requirement that the compositions must contain one of the specifically recited oxidation bases, logic mandates that Kalopissis examples 22, 27, and 32 "are characterized by the following essential features... they must contain... a paraaminophenol..."⁴ (Kalopissis, col. 2, line 67 - col. 3, line 5 (emphasis added).)

Thus, the statement that "[t]his office fails to see where Kalopissis states that paraaminophenol 'is essential to the composition and must be present,'" (Answer, pg. 6, ln. 11-12.), misses the point. When making this argument, the Examiner ignored the basis of the rejection itself, which relied upon replacing the p-aminophenol of a specific composition (22, 27, or 32) of the primary reference with Clausen's diaminopyrazole. (Answer, pg. 4, ln. 12-17.)

⁴ The full quote from Kalopissis is that "[t]he dye compositions according to the invention are characterized by the following essential features... they must contain a paraphenylenediamine or a paraaminophenol or a heterocyclic oxidation base such as 2,5-diaminopyridine or 2-hydroxy-5-aminopyridine." (Kalopissis, col. 2, line 67 - col. 3, line 5 (emphasis added)). In view of this statement, it could be argued that the p-aminophenol of example compositions 22, 27, and 32 could be replaced with paraphenylenediamine or a heterocyclic oxidation base such as 2,5-diaminopyridine or 2-hydroxy-5-aminopyridine. However, if replaced with "paraphenylenediamine... or a heterocyclic oxidation base such as 2,5-diaminopyridine or 2-hydroxy-5-aminopyridine," the Examiner's argument necessarily fails. Quite simply, but for this alleged superiority there would have been no motivation to replace any of these oxidation bases with Clausen's diaminopyrazoles because, at most, Clausen only asserts the superiority of the diaminopyrazoles over p-aminophenols. Clausen does not teach or suggest any improvement over or interchangeability with paraphenylenediamine or a heterocyclic oxidation base such as 2,5-diaminopyridine or 2-hydroxy-5-aminopyridine.

Specifically, ignoring the actual test of Kalopissis, the Examiner argued that

a proper reading of the (b) component in the [Kalopissis] composition is that a conventional oxidation base is essential, and that a heterocyclic oxidation base is perfectly equivalent to paraminophenol... Kalopissis is saying that the oxidation hair dyeing composition must contain a conventional oxidation base to go along with his inventive coupler.

(Answer, pg. 6, ln. 15-21). However, the disclosure of Kalopissis has been misstated in order to justify the rejection.

First, Kalopissis does not say that "conventional" oxidation bases are sufficient. Kalopissis instead states that

[t]he dye compositions according to the invention are characterized by the following essential features... they must contain a paraphenylenediamine or a paraaminophenol or a heterocyclic oxidation base such as 2,5-diaminopyridine or 2-hydroxy-5-aminopyridine....

(Kalopissis, col. 2, line 67 - col. 3, line 5 (emphasis added). The unsupported extrapolation of "paraphenylenediamine or a paraaminophenol or a heterocyclic oxidation base such as 2,5-diaminopyridine or 2-hydroxy-5-aminopyridine" to be "any conventional" oxidation base, though consistent with the erroneous position that all oxidation bases are equivalent, is contrary to Kalopissis. If Kalopissis had intended to teach that "conventional" bases may be used, they could have said so. Instead, Kalopissis identified as the essential feature one of two homocyclic oxidation bases or heterocyclic oxidation bases such as 2,5-diaminopyridine or 2-hydroxy-5-aminopyridine. Kalopissis does not teach or suggest that any "conventional" base is sufficient.⁵

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⁵ Not only does Kalopissis not support this alleged equivalence of oxidation bases; as shown in section B.2 below the proposition is simply wrong. Likewise the arguments in the Answer Brief regarding conventional oxidation couplers (Answer, pg. 10, ln. 20 - pg. 11, ln. 17) is unsupported by Clausen's actual text or any evidence of record.

- b. **The Examiner's proposal to leave some p-aminophenol in the Kalopissis compositions is unsupported by evidence of record and is internally inconsistent with the motivation based on the alleged deficiencies of p-aminophenol with respect to Clausen's diaminopyrazole.**

In an effort to circumvent Kalopissis's teachings-away from removing p-aminophenol (an essential feature of the composition), the rejection also includes the proposal to leave some undefined amount of p-aminophenol in the Kalopissis compositions and add to this Clausen's diaminopyrazole. (Answer, pg. 8, ln. 14 - pg. 9, ln. 3.) With respect to a reasonable expectation of success for the "at least partial substitution," the Examiner has argued that "a small amount of paraaminophenol is more tolerable than a larger amount." (Answer, pg. 8, ln. 22-23.) There are at least two major problems with this proposal.

First, there is no motivation to leave any amount of p-aminophenol in the Kalopissis compositions.⁶ Specifically, as cited by the Examiner, Clausen criticizes the physiological tolerability of p-aminophenol and alleges that their diaminopyrazoles are an improvement in several aspects. (Clausen, col. 1, ln. 43-68.) Thus, if diaminopyrazole is an improvement over p-aminophenol, the only possible motivation would have been to wholly replace p-aminophenol with diaminopyrazole. Unless one is trying to reconstruct the presently claimed invention, there would have been no motivation to leave even a small amount of p-aminophenol in Kalopissis's compositions.

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⁶ Likewise, wholly eliminating p-aminophenol is foreclosed by Kalopissis. As explained in section II.B.1.a, p-aminophenol is an essential feature of the cited example compositions, and there would have been no motivation to wholly replace it with Clausen's diaminopyrazole.

This is simply an ad hoc justification formulated to support the Examiner's erroneous position that all combinations of old components are *prima facie* obvious.

Second, while the general proposition with respect to 'small' vs. 'larger' amounts may be true (though Appellants do not necessarily agree in this specific case), there is no basis for asserting what is a 'small' amount versus a 'larger' amount in the case of p-aminophenol. The Examiner asserts that "it is common knowledge that reducing the amount of a substance that is not well tolerated can make it tolerable," and has attempted to analogize the situation to lactose intolerance or a strawberry allergy.⁷ (Answer, pg. 8, ln. 17-21.) However, the existence of a "threshold" for the physiological tolerability of p-aminophenol is not supported by any evidence of record.⁸ The Examiner, of course, cannot rely on alleged "common knowledge" in place of concrete evidence of record to establish a *prima facie* case.⁹ Once again, the argument appears to be merely an attempt to justify the erroneous position that all combinations of old components are *prima facie* obvious, but it is based on propositions wholly unsupported by any evidence of record.

In sum, there is simply no evidence to support a good faith argument that one skilled in the art would have been motivated in view of Clausen's critique of

⁷ If there is a threshold for the physiological tolerability of p-aminophenol, then the concentrations contain in Kalopissis may already be below this threshold. In this case, which has at least as much support as the Examiner's proposal, there would be no motivation to replace the p-aminophenol in Kalopissis's compositions with Clausen's diaminopyrazole. Once again, the Examiner's proposals are internally inconsistent, and do not establish a *prima facie* case of obviousness.

⁸ Clausen teaches, without limitation to 'larger' or 'small' amounts or thresholds, that p-aminophenol is "criticized for not being physiologically tolerable." (Clausen, col. 1, lines 43-65.) The Examiner's threshold supposition is not supported by Clausen.

⁹ A rejection based on such unsupported factual assertions will be reversed by the Federal Circuit as wholly insufficient to support a *prima facie* case of obviousness. See *In re Zurko*, 59 USPQ2d 1693 (Fed. Cir. 2001); *In re Sang-Su Lee*, 61 USPQ2d 1430.

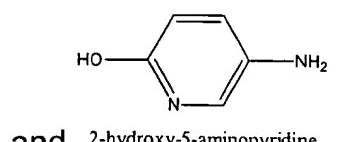
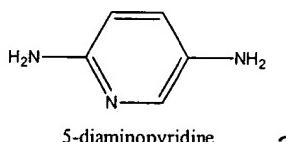
p-aminophenols physiologic tolerability to leave even "a small amount" in a hair dye composition.

2. The allegation of 'known equivalence' is factually wrong, contradicted by the very references relied upon and the Examiner's own arguments.

As noted above, in the Answer Brief the Examiner has argued that "a heterocyclic oxidation base is perfectly equivalent to paraaminophenol" and that "Kalopissis clearly teaches the equivalence of a heterocyclic oxidation base in place of paraaminophenol." (Answer, pg. 6, ln. 16-19.) However, this argument misstates the disclosure of Kalopissis, and is also contrary to the teachings of Clausen elsewhere relied upon by the Examiner.

First, Kalopissis states that their compositions "must contain a paraphenylenediamine or a paraaminophenol or a heterocyclic oxidation base such as 2,5-diaminopyridine or 2-hydroxy-5-aminopyridine." (Kalopissis, col. 3, ln. 3-5.) To say that this is a teaching that paraaminophenol is equivalent to *any* heterocyclic oxidation base or that the Kalopissis composition may contain *any* heterocyclic oxidation base is an extrapolation supported by nothing but "subjective belief and unknown authority." Lee, 61 USPQ2d at 1434. Had Kalopissis intended to say that their compositions may contain *any* heterocyclic oxidation base, Kalopissis would have stated that their compositions "must contain a paraphenylenediamine or a paraaminophenol or any heterocyclic oxidation base."

Instead, Kalopissis identifies particular two particular and structurally very similar

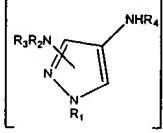
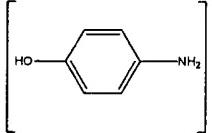


heterocyclic oxidation bases:

and (Kalopissis,

col. 3, ln. 3-5.) To ignore the fact that both of the identified heterocyclic oxidation bases are para-substituted aminopyridines, and construe these examples as representative of *any* heterocyclic oxidation bases is improper. There is no rational basis for ignoring the actual language and specific examples of Kalopissis in this manner. Lee, 61 USPQ2d at 1433 ("the process by which [the Examiner] reaches that result [of patentability] must be logical and rational.").

Second, the record is replete with teachings of the non-equivalence of oxidation bases. For example, as expressed by the Examiner, "Clausen teaches that the claimed

diaminopyrazoles  are an improvement over p-aminophenol  because they have better physiological properties." (Office Action dated Dec. 22, 2000, pg. 5, ln. 11-13; Office Action dated June 14, 2001, pg. 4, ln. 2-4; see also Clausen, col. 1, ln. 43 - col. 2, ln. 16.) Thus, given the express teaching that p-aminophenol is different from diaminopyrazoles, it is illogical and unsupportable for the Examiner to now argue that "a heterocyclic oxidation bases is perfectly equivalent to [homocyclic] paraaminophenol." (Answer, pg. 6, ln. 16-19.)

Moreover, the Examiner's alleged generalized equivalence of oxidation bases is expressly contradicted by the Examiner's recent indication (in view of the same references) that the appealed claims "would be allowable" if limited to triaminopyrazoles by eliminating diaminopyrazoles. (Exhibit 1, Proposed Examiner's Amendment dated May 2, 2002, pg. 2, ln. 6-8.) By indicating that claims directed only to triaminopyrazoles would be allowable, the Examiner acknowledged that not all oxidation bases, much less all aminopyrazole heterocyclic oxidation bases, are equivalent. If not all aminopyrazole

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are equivalent, it is all the more illogical and unsupportable for the Examiner to now argue that "a heterocyclic oxidation bases is perfectly equivalent to [homocyclic] paraaminophenol." (Answer, pg. 6, ln. 16-19.)

III. CONCLUSION

The claimed invention would not have been obvious over Kalopissis in view of Clausen. The Examiner's argument to replace p-aminophenol with a diaminopyrazole is foreclosed by Kalopissis's teachings that p-aminophenol is an essential feature of the compositions. The Examiner's argument to leave some amount of p-aminophenol and add a diaminopyrazole is foreclosed by Clausen's critique of p-aminophenol as being physiologically intolerable. The underlying basis of these rejections, that it is *prima facie* obvious to combine old components, is simply wrong.

Thus, for the reasons set forth herein, Appellants maintain that a *prima facie* case of obviousness has not been established by the Examiner based on the cited references, taken alone or in combination. The Examiner failed to demonstrate that one of ordinary skill in the art would have been motivated to make or have reasonable expectation of success for the modification or combination proposed by the Examiner. Accordingly, Appellants respectfully request reversal of the rejections of claims 20-47 under 35 U.S.C. § 103(a).

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Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
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Dated: July 5, 2002

By:

Mark J. Feldstein
Reg. No. 46,693

Enclosure:

- Exhibit 1: Examiner's Proposed Amendment, dated May 2, 2002.

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EXAMINER'S AMENDMENT

A proposed examiner's amendment to the record appears below. Should the changes and/or additions be unacceptable to applicant, an amendment may be filed as provided by 37 CFR 1.312. To ensure consideration of such an amendment, it MUST be submitted no later than the payment of the issue fee.

In an interview with Mark Feldstein on 5/1/2002, this office proposed that if diaminopyrazoles and the acid addition salts thereof were deleted from the instant claims, they would be allowable. He requested that this proposal be sent by fax.

The following amendment is suggested:

Delete "diaminopyrazoles," from line 2 of claim 20 , line 3 of claim 42 and line 5 of claim 47.

Cancel claims 26, 28-30.

Since this case is due out by close of business 5/3/02, the examiner would appreciate an answer as soon as possible.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Margaret Einsmann whose telephone number is 703-308-3826. The examiner can normally be reached on 7:00 AM -4:30 PM M-Th and alternate Fridays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Yogendra Gupta can be reached on 703-308-4708. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9310 for regular communications and 703-872-9311 for After Final communications.

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Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

ME

Margaret Einsmann
Primary Examiner
Art Unit 1751

May 2, 2002